

of those listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), Record at 17 & Findings 2-3, *id.* at 21; that the plaintiff’s allegations concerning his limitations were not totally credible, Finding 4, *id.* at 21; that he retained the residual functional capacity to perform a significant amount of work at the sedentary level of exertion, Finding 5, *id.*; that he was unable to perform any of his part relevant work, Finding 6, *id.*; that given his age (“younger individual”), education (high school or high school equivalent), lack of transferable skills and residual functional capacity, Rule 201.28 of Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the “Grid”), when used as a framework for decision-making, led to the conclusion that there were a significant number of jobs in the national economy that the plaintiff could perform, including the jobs of sedentary assembler, production inspector/grader and sedentary cashier, Findings 7-10, *id.*; and that, therefore, the plaintiff was not under a disability, as that term is defined in the Social Security Act, at any time through the date of the decision, Finding 11, *id.* at 22. The Appeals Council declined to review the decision, *id.* at 6-8, making it the final determination of the commissioner, 20 C.F.R. § 415.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner’s decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

references to the administrative record.

The administrative law judge reached Step 5 of the sequential review process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff's statement of errors also implicates Step 3 of the review process. At Step 3, a claimant bears the burden of proving that his or her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. § 416.920(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment, the claimant's medical findings (*i.e.*, symptoms, signs and laboratory findings) must match those described in the Listing for that impairment. 20 C.F.R. §§ 416.925, 416.928. To equal a Listing, the claimant's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. § 416.926(a). Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 416.926(b).

Discussion

A. The Listing

The plaintiff contends that the administrative law judge erred in concluding that he did not meet or equal Listing 9.08(A), the listing for diabetes mellitus with neuropathy. Statement of Specific Errors (Docket No. 6) at 1-3. That listing provides:

9.08 *Diabetes mellitus*. With:

A. Neuropathy demonstrated by significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C).

20 C.R.F. Part 404, Subpart P, Appendix 1, § 9.08(a). Section 11.00(C) of the Listings defines “persistent disorganization of motor function” as being “in the form of paresis² or paralysis, tremor or other involuntary movements, ataxia or other involuntary movements.” That section of the Listings also directs that “[t]he assessment of impairment depends on the degree of interference with locomotion.” The plaintiff asserts that neuropathies of his right and left feet are demonstrated in the findings of Katarzyna Sadurska, M.D., David Goodenough, M.D., and Nima Moghaddas, D.P.M. Statement of Specific Errors at 2-3.³ None of the pages of those physicians’ records cited by the plaintiff mention any of the conditions listed in section 11.00(C) of the Listings. *See* Record at 201-12, 316-30, 343, 357. Dr. Goodenough describes the neuropathy as in the right lower extremity only and as “early or mild.” *Id.* at 357. On February 12, 2003, Dr. Sadurska “suspect[ed] that he is still in reversible phase of the diabetic neuropathy.” *Id.* at 209. On February 24, 2004 Dr. Sadurska noted that “[h]e is still having some discomfort in his feet but using [the prescribed medications] this seems to be improving.” *Id.* at 316.

The administrative law judge noted the plaintiff’s reports of foot pain and Dr. Sadurska’s reports that the pain had improved. *Id.* at 16. He also noted her report in February 2004 that the plaintiff’s condition was significantly improved and that his diabetes was well-controlled. *Id.* He also cited the reports of the state-agency physician reviewers who found in January and June 2003 that the plaintiff could

² Paresis is partial or incomplete paralysis. *Stedman’s Medical Dictionary* (27th ed. 2000) at 1316.

³ The plaintiff also relies on the findings of a physician’s assistant, Tracy Allen. Statement of Specific Errors at 2-3. A physician’s assistant is not considered an acceptable medical source under applicable regulations, 20 C.F.R. § 416.913(a), and the form completed by Tracy Allen on which the plaintiff relies, Record at 358, is not countersigned by a physician. Because counsel for the defendant at oral argument disclaimed any reliance on the fact that Allen’s findings were not always countersigned by Dr. Sadurska, I raise the issue but do not rely on Allen’s status in reaching my recommended (continued on next page)

stand and/or walk about two hours in an eight-hour work day and could not use foot controls frequently. *Id.* at 17, 215, 223. These limits are included in the residual functional capacity assigned by the administrative law judge. *Id.* at 18. The plaintiff also cites an April 2004 report of Tracy Allen that was not available to the state-agency physicians. Statement of Specific Errors at 2-3. That one-page document is a form on which Allen circled certain descriptions of the plaintiff's pain and under the heading "Comments" stated "Patient with profound neuropathy in lower extremities." *Id.* at 358. This form cannot reasonably be read to establish any of the conditions listed in section 11.00(C) of the Listings. The administrative law judge did not err in concluding that the plaintiff did not meet Listing 9.08(A).

B. Evaluation of Pain

The plaintiff also contends that the administrative law judge erred in discounting his testimony to the effect that the pain in his feet was so severe that he was unable to sit, stand or walk for prolonged periods. Statement of Specific Errors at 3-4; Record at 19. He asserts that Dr. Goodenough's report "clearly sets forth the basis for the Plaintiff's complaints of pain." Statement of Specific Errors at 4. As I have already noted, Dr. Goodenough assessed the plaintiff's neuropathy as "early or mild" in December 2002. Record at 355, 357. The plaintiff essentially affirmed in his May 2004 testimony, in reference to the pain in his feet, that he could stand for two hours out of an eight-hour day, *id.* at 31, 42, which is consistent with the residual functional capacity assigned by the administrative law judge. The plaintiff also testified that pain, aggravation and itching in his feet kept him from working, *id.* at 46, and that every day he had some tingling, burning or itching in his feet, *id.* at 47. The plaintiff's statement of errors does not refer specifically to any of

conclusion.

the plaintiff's testimony concerning pain, so it is difficult to understand the plaintiff's argument on this point.⁴

To the extent that the plaintiff contends that the administrative law judge should have considered Allen's assessment of his pain as set forth on the one-page report at page 358 of the record, *see* Statement of Specific Errors at 4, the statements circled by Allen are inconsistent with the medical evidence, which does not indicate any increase in the severity of the plaintiff's neuropathy since Dr. Goodenough found it to be early or mild and Dr. Sadurska's concluded that the plaintiff's neuropathy was probably still in the reversible phase and later stated that his foot pain was improving.

The plaintiff has not demonstrated that the residual functional capacity determined by the administrative law judge lacks evidentiary support due to its treatment of the plaintiff's claims of pain.

C. Need for a Medical Advisor

The plaintiff also contends, in conclusory fashion, that this case should be remanded "to take the testimony of a medical advisor on the questions of listing level impairment and residual functional capacity." Statement of Specific Errors at 4. I have already concluded that the plaintiff has not demonstrated any reversible error in the administrative law judge's evaluation of Listing 9.08(A) or his treatment of the plaintiff's claims of pain. At oral argument, counsel for the plaintiff stated that he did not contend that the testimony of a medical advisor was required for some other reason, and, in any event, the use of a medical advisor is a matter within the commissioner's discretion. *Rodriguez Pagan v. Secretary of Health &*

⁴ At oral argument, counsel for the plaintiff identified pages 316, 321 and 324 of the record as providing medical evidence of pain associated with neuropathy in the plaintiff's feet. A note completed by a "diabetes educator" dated October 16, 2003 noted that the plaintiff reported limited physical activity secondary to painful feet. Record at 324. At page 321, a note of the same date signed by Dr. Sadurska also noted the plaintiff's report that his feet were painful when he walked. At page 316, a report dated February 24, 2004 and signed by Dr. Sadurska noted that the plaintiff was "still having some discomfort in his feet but . . . this seems to be improving." Contrary to the suggestion of counsel for the plaintiff at oral argument, the reference in this report to the plaintiff being "maxed out" on a particular medication is in reference to his difficulty sleeping, not the pain in his feet. Considered chronologically, these pages of the record indicate an improvement in the pain in the plaintiff's feet.

Human Servs., 819 F.2d 1, 5 (1st Cir. 1987). The plaintiff has not shown that that discretion was abused in this case.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of March, 2005.

/s/ David M. Cohen

David M. Cohen

United States Magistrate Judge

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